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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 634

MAXWELL SHENKER,

Libelant,

against

UNITED STATES OF AMERICA,

Respondent,

against

AMERICAN STEVEDORES, INC.,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

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AMERICAN STEVEDORES, INC.,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, American Stevedores, Inc., prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit filed August 21, 1963, and the denial of said petitioner's petition for rehearing and rehearing *in banc*, without opinion, filed on September 17, 1963, in so far as said decision and judgment affirmed the decree entered in the United States Court for the Eastern District of New York on

October 2, 1962, which, in a marine personal injury case, found in libelant's favor against respondent, the shipowner, by reason of unseaworthiness of its vessel, and further granted the said respondent a full indemnity over against petitioner, the contracting stevedore.

Opinions Below

The opinions of the District Court (Rosling, D. J.), not officially reported, are printed in the Appendix hereto, *infra*, pages 35-54.

The Court of Appeals for the Second Circuit opinion of affirmance by Marshall, C. J., concurred in by Kaufman, C. J., with dissenting opinion by Friendly, C. J., not yet officially reported, are printed in Appendix hereto, *infra*, pages 15-34.

Jurisdiction

Judgment was entered in the United States Court of Appeals for the Second Circuit on August 21, 1963. Petitioner's petition for rehearing was denied by order filed September 17, 1963.

The jurisdiction of this Court to review the judgment by writ of certiorari is found in 28 U.S.C. Secs. 1254(1) and 2101.

Questions Presented

The majority decision of the court below presents the following questions:

Relative to the warranty of seaworthiness issue

1. Has the doctrine of the warranty of seaworthiness application to a shore-based clerical employee of an inde-

pendent contracting Stevedore, injured while aboard a vessel, when the sole purpose of his being aboard said vessel was to obtain clerical information from a co-worker for the exclusive and independent business interest of Stevedore?

Relative to the indemnity issue

2. (a) Is the contributory negligence of an employee found to have contributed to his accident, to be imputed to his Employer to create a liability on the part of the Employer to an Indemnitee under a contract by which the Employer promised to indemnify the Indemnitee for any loss occasioned by the negligence of the Employer in the performance of work under the contract.

(b) Absent any proof of an independent legal duty undertaken by a Master to protect a Servant from any and all hazards which the latter may encounter in the course of his employment; can negligence be attributed to a Master under common law principles on the grounds that a fellow-servant of the injured Employee failed to warn or otherwise act to save the latter from an injury caused by an existing and patent defect as obvious to the injured Employee as it was to the fellow-servant.

Statement of the Case

This action, filed pursuant to the Public Vessels Act, 46 U.S.C. Sec. 781 *et seq.*, involves the liability of a shipowner for injuries suffered by libelant, a shore-based clerical employee of American Stevedores, Inc. (hereinafter Stevedores), on the occasion of his singular visit aboard the respondent's vessel, the *Craig*, on May 28, 1957 to obtain information for Stevedore's payroll purposes. After obtaining that information, and while walking on the covered top surface of the No. 2 hatch in broad daylight in order to go back to the pier, he tripped over a

board and fell to the vessel's main deck, a distance of about three feet.[1]

From May 21 to May 28, 1957 the *Craig* was moored at the Brooklyn Army Base where, pursuant to contract, longshoremen employees of Stevedore worked cargo aboard her. On May 28, 1957, the accident date, one gang of longshoremen was aboard loading cargo into the No. 1 hatch (109a).[2]

Libelant was a timekeeper employed by Stevedore. He had an office on the pier (61a). In the course of the day's activity he was expected to be in his office and available to take calls from Stevedore's main office (62a-63a). He had nothing to do with the actual stowage of cargo (84a). He

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[1] Aside from the finding made below as to how the accident happened, there is no dispute as to the facts. The trial Court's finding as to the cause of the accident was quite contrary to libelant's own testimony concerning the subjective matter of his position immediately prior to his accident (given on direct and cross-examination and on interrogation by the court itself) as being at "full halt" position at the hatch's edge and in a squatting position preparatory to getting off the hatch cover, when he fell (52a; 83a-84a). The judge while acknowledging "that the absence of forward momentum at the precise instant before his fall renders visualization of the circumstantial sequences difficult, if not impossible", rejected such testimony on the ground that libelant's "claim to total kinesthetic recall of his immediately antecedent bodily gyrations the court rejects as mere reconstructed imagery by a glib but inexperienced witness. He seemingly had not earlier or, perhaps, sufficiently been admonished by counsel that not all questions put to him need be *factually answered.*" (R. 1126) [Emphasis ours].

With great respect to the trial court such reasoning would appear quite irrelevant, or, if it is relevant, only serves to show that the "unless, 'clearly erroneous' " rule works in a very strange way in view of what the court in colloquy stated concerning libelant, as follows:

> "The Court: You don't consider that this witness is lacking in intelligence. His answers thus far show a precise familiarity with the responsiveness and so on. Suppose you just ask him to tell us." (53a-54a)

[2] Numbers followed by the letter "a" refer to pages in the Appendix to petitioner's brief in the Court of Appeals.

was basically an observer on the pier and his record keeping activities "could as well have been accomplished without his setting foot outside his shoreside headquarter" (19a). The activity records kept by him were so the Stevedore "company in the main office would figure their costs and profits" (43a).[3]

While in his pier office on May 28, 1957, he received a telephone call from Stevedore's head-timekeeper to determine when the longshore gang working aboard the *Craig* would finish work that day. That information was needed by Stevedore so that its payroll records could be prepared (47a; 87a-89a). Libelant telephoned the *Craig* to get that information, but on receiving no answer "decided to go aboard for personal consultation with one Judice," Stevedore's foreman in charge of the longshore gang aboard the *Craig* (19a; 47a).

Libellant boarded the *Craig* at "about 1:50 P. M.," May 28, 1957. He walked forward along the starboard (inshore) main deck passageway to near the forward part of the No. 2 hatch, when he saw Judice on the opposite side of the hatch (22a; 46a-48a). Shouting to Judice to make himself heard above the ship and harbor noises, he attracted Judice's attention. The latter acknowledged him, then mounted the No. 2 hatch on its port side. Libelant, in turn, mounted on the starboard side.

The structural fixtures of the ship located within the deck area forward of the No. 2 hatch foreclosed its use "as a feasible route" by one intending to pass from one

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[3] To support its billing the ship, Stevedore under the contract was required to submit a "Daily Time and Activity Report" (Form 87) concerning its daily operations. The respective Form 87 covering Stevedore activities on the *Craig* for May 22, 23 and 27, 1957 (those being the days Stevedore worked cargo thereon prior to the accident date) were completed, signed and certified to by Libelant (Gov't Exhib. L, Evid.), although never once on those days had he gone aboard the *Craig* "to do one bit of checking or one bit of observation of any kind." (86a-89a).

side of the ship to the other side (21a). In walking on the hatch libelant and Judice "were following a customary practice" and lacking a clearly defined and "reasonably safe alterate route" "their procedure was not unreasonable" (23a).

The No. 2 hatch cover, rectangular in shape, measured 24 feet in length by about 23 feet wide (21a). The canvas covering it was smooth with no cargo on it (91a). Libelant and Judice met near the hatch's center where they spoke for "a second or two" and then walked toward the starboard after corner of the hatch (76a-77a); libelant planning to get off the hatch to go back to the pier (136a). The trial judge found that when libelant was "within a few feet from the starboard side of the cover" and "without ever having paused or stopped his walk at any time", he stubbed his toe against a piece of lumber (about 4 feet long x a foot wide x an inch thick) which was on the cover and fell therefrom to the main deck of the vessel (24a-25a).

In the absence of proof to account for the presence of the board on the hatch and its duration thereon, the trial court disallowed libelant's negligence claim (27a). However, it found the *Craig* to be unseaworthy, which condition was a proximate cause of the accident. In concluding libelant to be a "seaman" and affording the protection of the "seaworthiness" warranty to him, the court held his clerical duties exposed him "to certain of the hazards which the stevedores encounter in their more laborious output of physical labor" and he was an "integral participant in the maritime service of the stevedore and assimilated their status as a person engaged in the ship's service" (19a-20a).[4]

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[4] The libelant himself described his duties (64a-65a):

"Q. So then, it is fair to state that you were an observer at the pier to observe what was going on; is that correct, sir? A. Yes.

(Footnote continued on following page)

The majority opinion below in affirming libelant's status as that of a "seaman" states that libelant's record keeping duties "required, as the district court found, that he be aboard ship frequently. Shenker performed tasks which are a normal and necessary incident to the effective functioning of the ship" (Appendix hereto, *infra*, p.).

Such a premise finds no support in the record herein, for there is no finding by the trial court to such effect. It was libelant's testimony, in no way contradicted by any other proof to the contrary, that his initial visit aboard the *Craig* was on May 28, 1957, shortly before his accident. Further, there was no proof to show that payroll information he sought for Stevedore benefited shipowner or that it was done pursuant to any duty traditionally performed by the ship's crew.[5]

(Footnote continued from preceding page):

Q. And except to observe and record and make records, your duties—you had no other duties; is that right, sir? A. Well, to observe and record and to process papers. That's about the size of my—of what my duties consisted of.

Q. And where did you process those papers? A. In my office."

So far as his employer and the ship's foreman were concerned he described his duties (62a-63a):

"Q. If they (employer) wish to contact you, how do they contact you? A. They call me on my telephone.

Q. So they expect you to be at your desk available for telephone calls; is that right, sir? A. Yes.

Q. And if any of the foremen want to contact you, foremen aboard the ships, if they wish to contact you, how do they contact you, sir? A. They would try to phone me or—that would be about the way—or they would see me when they are knocking off or when the gang is coming out at noontime or going back at one o'clock.

Q. Are there phones aboard the ships which can— A. Yes, sir."

[5] Libelant's proffered testimony as to what may have been his usual practice in boarding *other ships* is, in our opinion, quite irrelevant to the question of the *Craig's* absolute liability to him under her "seaworthiness" warranty; as irrelevant as would the fact that one had trespassed on Whiteacre be to the question whether he had trespassed on Blackacre.

On the indemnity issue, there was no finding of any primary negligence on Stevedore's part.[6] In holding Stevedore to have been negligent the lower court did so on the dual theory (1) that the contributory negligence of libelant was imputable to Stevedore and his injury therefore "subsumed to be one 'occasioned in part by the negligence or fault of the (Contractor's) * * * employees in the performance of work under the contract' " (33a)[7]; and (2) that libelant's co-employee, Judice, was "at least in equal fault" with libelant for his not having seen the board over which libelant fell in time "to warn him or jostle him out of danger" (35a).

There was no proof that Judice had undertaken any independent legal duty to protect libelant.[8]

The majority of the court below affirmed and sustained the trial court on its interpretation of the applicable law.

[6] The record herein negates any basis for charging Stevedore with *primary negligence*, for the proof shows that 1) the longshoremen completed work at No. 2 hatch at 4:40 P.M., May 27, 1957, which finished Stevedore's work in that area (205a-206a; 210a); 2) that thereafter the *Craig's* crew took over the control and duty of inspection of No. 2, and following customary procedure the crew secured the hatch by spreading and battening down the tarpaulin covering (209a-210a); 3) the Craig's Mate (Rosteck) checked the Stevedore operation on May 28, 1957 and defined its work location as the No. 1 hatch (198a-199a; 217a); 4) the contract imposed no duty on Stevedore to maintain any other parts of the vessel aside from its "work locations"; (Clause 12(4), Gov't Exhib. K, Evid.—240a); 5) the board found as causing libelant's accident was not Stevedore dunnage (143a); 6) Stevedore's employees in using the hatch covering to walk on were following a customary ship's practice and was not unreasonable (23a). There is no claim that Stevedore was negligent in its selection of employees.

[7] The indemnity stipulation of the contract (Clause 12) is set out in the Appendix to petitioner's brief in the Court of Appeals at pages 251a-252a.

[8] With all deference to the lower court, we do not think the use of the phrase "in equal fault" is material to the question of Judice's liability as a tort-feasor. The bare undertaking of the two in walking on the hatch gives no rise to a "joint venture". Judice either is negligent or not negligent; and such depends on proof of a legal duty owed by Judice to libelant and its breach.

Reasons for allowance of the writ

The majority decision of the court below in so far as it extends the warranty of seaworthiness to a shore-based clerical worker is not in accord with but conflicts with the decision of this Court in *United N. Y. & N. J. S. H. Pilots Assn.* v. *Halecki*, 358 U. S. 613.

Further, it is contrary to the *ratio decidendi* of *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, and other relative pronouncements of this Court decided subsequent thereto bearing on the scope of the "seaworthiness" warranty as applied to harbor workers.[9]

From this Court's opinion delivered in *Sieracki* it is clear what the *ratio decidendi* was which led to the holding therein that the plaintiff—longshoreman injured while actually working cargo was a "seaman". The facts in *Sieracki* which enabled the Court to extend the "seaworthiness" warranty to plaintiff are remote from the facts of the present case.

Based on the record herein, the "ship's work" criterion as the determinative consideration has not been met. The decision below in equating libelant status with that of a "seaman" has altered the historical "ship's work" premise of *Sieracki*. By so doing, the decision unwarrantedly extends the warranty of seaworthiness to one who is aboard the vessel pursuant to some independent interest of a third party and one not shown to be related to traditional "ship's work".

The majority decision below by negating the historical "ship's work" basis of *Sieracki*, detracts from the value and importance of that and other relative landmark deci-

[9] In the cases in which the Supreme Court has allowed recovery the plaintiff has either been a seaman (*Mahich* v. *Southern S.S. Co.*, 321 U. S. 96); a longshoreman (*Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85); a repairman of cargo loading equipment (*Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406; *The Tungus* v. *Skovgaard*, 358 U. S. 588).

sions as guiding precedents. It is urged, with respect, that any change in the basic "ship's work" premise should come from this Court, for it alone can authoritatively determine for the further guidance of the lower courts the extent to which, if at all, the principle of *Sieracki* ought now be regarded as qualified.

The application of the doctrine of seaworthiness as applied to harbor workers has resulted in some degree of uncertainty as to the ultimate scope of the doctrine and the decisions are conflicting.[10] The conflict stems in the main from what criterion has been adopted by the lower courts. Where the courts have adopted the "ship's work" test, the "seaworthiness" warranty has not been extended, unless the work on which the plaintiff was engaged was of a kind that the crew of a vessel was accustomed to perform." (*Berge* v. *National Bulk Carriers Corp.*, 2 Cir., 251 F. 2d 717, cert. den. 78 S. Ct. 994.)

This Court's decisions in *Halecki*, *supra*, and in *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U. S. 625 (1959), however, should have served to place the "ship's work" test of *Sieracki* secure upon its pedestal and remove any lingering doubts which may remain that plaintiff's mere lawful presence on the vessel is sufficient.

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[10] *Rees* v. *The S.S. Zealand* (4 Cir.), 240 F. 2d 820, doctrine extended to watchman employed by a port service company. *Imperial Oil, Ltd.* v. *Drlik* (6 Cir.), 234 F. 2d 4, court recognized that member of dock crew entitled to warranty. *Bruszewski* v. *Isthmian S.S. Co.*, 66 F. Supp. 210, aff'd 163 F. 2d 720 (3 Cir.), cert. den. 333 U. S. 828, employee of contractor aboard ship repairing broken boom held not within the warranty. *Martini* v. *United States* (2 Cir.), 192 F. 2d 649, cert. den. 343 U. S. 926, excluding from warranty superintendent of an engineering company injured in course of duties aboard vessel. *Lee* v. *Pure Oil Co.*, (6 Cir., 1955), 218 F. 2d 711 (dictum), doctrine not applicable to bakery employee fatally injured while walking on defendant's barge to get to off-shore towboat. In *Filipek* v. *Moore-McCormack Lines, Inc.* (2 Cir.), 258 F. 2d 734, doctrine held not to protect a boom tester, a representative of American Bureau of Shipping, aboard pursuant to a standard external to the ship.

The majority and minority opinions of the court below reflect this basic divergence.

The majority opinion below in extending the warranty to libelant negates the "ship's work" basis as the established nexus between the shipowner and the injury. In so doing, it contravenes the authoritative precedents of this Court; tends to perpetuate the decisional disharmony and will result only in needless error and appellate litigation.

The issue presented herein as to the ultimate scope of the "seaworthiness" doctrine is one of broad nature and of substantial general interest to the shipping industry and the modern day marine operation corollary thereto; the latter operation requiring the services of numerous shore-based employees for clerical and other specialized duties unrelated to traditional "ship's work." Search for distinctions justified in policy for extending the warranty to such workers becomes difficult once the historical "ship's work" premise of *Sieracki* is abandoned. If the exposure to risk of being aboard a ship is alone sufficient to impose liability without fault on the shipowner, no policy showing is made that shipboard hazards differ materially in kind from or are substantially more dangerous than those to which industrial employees working ashore are subjected.

Indicating a necessity for settlement by this Court of the issue presented, Judge Friendly, in dissent, states that the historical basis of *Sieracki* for extending the warranty of seaworthiness to harbor workers and the other complexities presented in today's marine-indemnity case, "argue against our applying the warranty of seaworthiness to a shore-based office worker unless decisions of the Supreme Court call for that" (Appendix hereto, *infra*, p. 28).

As to the indemnity issue

If this Court should hold, as respects the warranty of seaworthiness issue hereinabove stated, that libelant came

within its protective scope, this Court should then determine whether the trial court and the court below in affirming erred in concluding Stevedore to have been negligent[11] and requiring it to indemnify shipowner.

The decision of the court below in so far as it imputes libelant's contributory negligence to the Stevedore-employer as a ground for holding the latter liable for indemnity under the contract stipulation is believed to be erroneous and the conflicting decision of the Fifth Circuit Court of Appeals in *Drewery* v. *Daspit Bros. Marine Divers, Inc.*, 317 F. 2d 425 (1963), correct.

Under the contractual stipulation herein, whether the indemnitee's claim is regarded as based on contract or tort, proof of some negligence by Stevedore is essential.[12] There was no evidence in the court below of any breach of duty by Stevedore. Absent any proof to account for the board's presence and its duration on the hatch, the lack of notice, actual or constructive, which the trial judge found to acquit shipowner of negligence similarly should absolve Stevedore. There is nothing in precedent to suggest, nor any reason to suppose, that the test for establishing shipowner's negligence is different than the test to establish negligence to support an indemnity liability.

It is a fundamental principle that liability for negligence must rest on an existent legal duty, the breach of which gives rise to foreseeable damages. However, contributory negligence does not depend upon a breach of duty. It bears only upon the question whether plaintiff failed to use reasonable care for the safety of himself, so that he becomes the author of his own wrong. The

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[11] Negligence, like unseaworthiness, is a question of law not within the "unless clearly erroneous rule". *Romero* v. *Garcia & Diaz, Inc.*, 280 F. 2d 347, 355 (2 Cir.), cert. den. 365 U. S. 869.

[12] See *Lamazza* v. *United States* (D.C.S.D.N.Y.), 190 F. Supp. 692, 695-696, involving a contract similar to the one involved in the instant case.

decision below in concluding Stevedore to be negligent by imputing to it libelant's own negligence makes a fundamental change in the common law.

Furthermore, consideration of common law principles giving rise to the doctrine of imputed contributory negligence furnishes neither precedent nor policy justification for the imputation of libelant's contributory negligence to Stevedore. The doctrine, which had its origin in the English case of *Thorogood* v. *Bryan* (1849), 8 C. B. 115, 137 Eng. Rep. 452, found little general acceptance and was repudiated by this Supreme Court in *Little* v. *Hackett*, 116 U. S. 366. See also *Miller* v. *Union Pacific R. Co.*, 290 U. S. 227, 231-232.

The doctrine of vicarious liability,—the imputation of *primary negligence*, while resting on a legal fiction, had its policy justification in providing a socially desirable distribution of the risk of loss by furnishing financially responsible defendant's to injured plaintiffs. However, no such policy consideration exists in the case of imputed contributory negligence.

The doctrine now pronounced in the majority opinion below would institute a vicarious blame rule, not based on primary negligence, but grounded on contributory negligence. By so doing it takes the common-law vicarious rule a further step by adding a legal fiction to another legal fiction, and thereby extends a standard of absolute liability to Stevedore.

Relative to the conclusion of Judice's negligence, the record herein does not support the existence of any legal duty owed by him to protect libelant. The defect was not created by him and there is no proof that he had notice of the condition. The bare fact arising from the mutual undertaking of libelant and Judice walking on the hatch, a movement involving no special skill, cannot give rise to a legal duty. The opinion below in holding Judice negligent radically alters the common law and relies on

an alleged breach of duty existing neither under the contract herein nor under established precedent.

It is urged with respect that this Court render its authoritative decision on the issue presented herein, for the fundamental alteration which the court below has made in the common law on which to base its indemnity holding is neither justified on grounds of policy nor legal precedent.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that a writ of certiorari be granted to review the judgment and decree herein of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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GEORGE J. CONWAY,
MICHAEL J. KENNY,
On Petition.

Opinion of United States Court of Appeals for Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 315—October Term, 1962

(Argued May 7, 1963 Decided August 21, 1963)

Docket No. 27949

MAXWELL SHENKER,

Libelant-Appellee.

v.

UNITED STATES OF AMERICA,

Respondent-Appellant-Appellee.

v.

AMERICAN STEVEDORES, INC.,

Respondent-Impleaded-Appellant.

Before:

FRIENDLY, KAUFMAN and MARSHALL, *Circuit Judges.*

Appeal by the United States, defendant below, and American Stevedores, Inc., impleaded defendant, from an interlocutory decree in admiralty, entered by the United States District Court for the Eastern District of New York, Rosling, J., which awarded the libelant, Maxwell Shenker, a judgment in the amount of $12,500 against the United States, and granted the United States indemnity in the same amount from American Stevedores, Inc. Affirmed.

Opinion of United States Court of Appeals for Second Circuit.

STANLEY P. DANZIG, New York, N. Y. (Fuchsberg & Fuchsberg, on the brief) *for Libelant-Appellee.*

PHILIP A. BERNS, Attorney, Admiralty & Shipping Section, Dept. of Justice, Washington, D. C. (John W. Douglas, Asst. Atty's General, Joseph P. Hoey, United States Attorney, Leavenworth Colby, Chief Admiralty & Shipping Section, Dept. of Justice, Morton S. Hollander, Chief, Appellate Section, Civil Division, Dept. of Justice and Louis E. Greco, Attorney in Charge, New York Office, Admiralty & Shipping Section, Dept. of Justice, on the brief) *for Respondent-Appellant-Appellee.*

MICHAEL J. KENNY, New York, N. Y. (George J. Conway, Proctor, New York City, on the brief) *for Respondent-Impleaded-Appellant.*

MARSHALL, *Circuit Judge:*

This is an appeal by the United States, defendant below, and by American Stevedores, Inc., which was impleaded as defendant, from an interlocutory decree in admiralty entered in the United States District Court for the Eastern District of New York after a trial before Judge Rosling, sitting without a jury. The decree awarded a judgment in the amount of $12,500 to the libelant, Maxwell Shenker.

Shenker is a stevedore timekeeper who was injured on May 28, 1957, while aboard the Lt. Robert Craig, a naval vessel owned and operated by the United States which was moored at the Brooklyn Army Terminal. Asserting jurisdiction under the Public Vessels Act, 46 U. S. C. §§ 781-90, he brought suit against the United States, alleging unsea-

worthiness and negligence. The United States then impleaded as defendant American Stevedores, the stevedoring contractor which employed Shenker, seeking indemnity from it, under the terms of an express contract between the parties, for any recovery which Shenker might have.

At the close of all the evidence, the district court in an unreported opinion held that the United States was liable to Shenker because of the unseaworthiness of the Lt. Robert Craig, "but the libelant's own fault contributed in equal degree to the accident." Damages of $25,000 were found and a judgment of $12,500 was entered since the court's finding that libelant's contributory negligence was 50 per cent responsible for the accident resulted as a matter of law in a reduction by 50 per cent of the total amount of damages to which he would otherwise have been entitled. *Ktistakis* v. *United Cross Navigation Corp.*, 316 F. 2d 868 (2 Cir. 1963); *Dunbar* v. *Henry DuBois' Sons Co.*, 275 F. 2d 304 (2 Cir.), *cert. denied*, 364 U. S. 815 (1960); *Boat Dagny, Inc.* v. *Todd*, 224 F. 2d 208 (1 Cir. 1955). Libelant's claim was disallowed to the extent that it rested upon an allegation that the United States was negligent. *Cf. Poignant* v. *United States*, 225 F. 2d 595 (2 Cir., 1955). The district court further held that the United States, under the terms of its contract with American Stevedores, was entitled to indemnification from the stevedoring contractor in the amount which it was required to pay to Shenker.

The United States appeals from the judgment in favor of libelant, urging in the alternative that if that judgment is affirmed, the judgment awarding it indemnity against American Stevedores also be affirmed. American Stevedores appeals from the judgment in favor of libelant and from the indemnity judgment in favor of the United States. Shenker, resting upon his judgment, has not appealed; there is thus no challenge by any party to the district

court's findings that Shenker was contributorily negligent and in a degree that was 50 per cent responsible for causing his injuries.

The findings of fact of the district court are amply supported by the record and we sustain them as not clearly erroneous. *McAllister v. United States*, 348 U. S. 19 (1954). Briefly stated, they present the following picture of the events leading to the accident in which Shenker was injured.

On May 28, 1957, Shenker, who was then 62 years old, was performing his duties as timekeeper for American Stevedores at a pier at the Brooklyn Army Terminal. The Lt. Robert Craig had been moored starboard side to the pier since May 22 while longshoremen employed by American Stevedores, working under a governmental contract, discharged and loaded the vessel's cargo. Shenker worked from an office at the pier. On the day of the accident he had been instructed by his supervisor, one Perrone, who was the head timekeeper, to ascertain when the stevedores who were working aboard the ship would quit work that day. After attempting to obtain the information by telephone and receiving no answer, Shenker decided to go aboard the ship to consult with Domenic Judice, the American Stevedores foreman in charge.

Shenker boarded the ship shortly before 2 p.m., by means of the starboard accommodation ladder. Once aboard he turned right and walked forward along the starboard side of the main deck until he saw Judice walking along the portside of the main deck. Shenker yelled to Judice in order to attract his attention. When he noticed Shenker, Judice waved and beckoned to him. Judice mounted the No. 2 hatch from its portside and Shenker mounted it from the starboard side. The hatch, a box-like structure measuring 24 feet long and slightly more than 22 feet wide, was

raised about 40 inches above the main deck and had been covered with protective tarpaulins and battened down. The two men met at approximately the center of the hatch and engaged in a conversation for a minute or two about whether the stevedores would complete the cargo operations before five o'clock. When the conversation was completed, they proceeded to walk together to the starboard side of the hatch.

Shenker intended to get off the hatch by "squatting down" at the edge of it, placing his hand on the tarpaulin for support, and easing himself down onto the deck. However, when he and Judice came to within a few feet of the starboard side of the hatch, he unexpectedly stubbed his toe against a piece of dunnage—a plank of lumber about four feet long, a foot wide, and an inch thick—which had been lying on the hatch but which neither man had seen earlier. Shenker pitched forward and fell to the deck, the board falling with him. He sustained multiple injuries which necessitated a lengthy period of hospitalization and medical care, and was left with a marked limp.

On cross-examintion Shenker was asked:

> "Q. And as you walked—how far a distance did you walk from where you were standing in the center of the hatch, talking to Mr. Judice? How far did you walk over to the edge of the hatch in distance? A. Maybe ten, twelve feet.
>
> Q. During that ten or twelve feet, did you have occasion once to look down where you were walking and to look ahead of you? A. No, I didn't. We were looking and talking to each other, looking at each other."

In finding on these facts that Shenker was contributorily negligent, the district court said, "His very unfamiliarity

with the vessel which serves him in his disclaimer of knowledge of routes less perilous than the one he selected, called upon him to exercise a commensurately greater caution * * *. A minimal regard for his own safety demanded that he look about him as he walked in alien surroundings—not in the unobservant fashion he adopted, wherein he was oblivious to lurking danger underfoot."

We deal first with the challenges made by appellants to Shenker's right to recover.

Under legal principles now well established, a ship and its owner are liable to indemnify a seaman for injuries caused by the unseaworthiness of the vessel or its appurtenant appliances and equipment. *The Osceola*, 189 U. S. 158 (1903); *Mahnich* v. *Southern Steamship Co.*, 321 U. S. 96 (1944). See Note, 76 Harv. L. Rev. 819 (1963). The shipowner's duty to furnish a seaworthy ship is not a duty to furnish an accident-free ship; "it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use." *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 550 (1960); *Gutierrez* v. *Waterman Steamship Corp.*, — U. S. — (1963); *Massa* v. *C. A. Venezuelan Navigacion*, 298 F. 2d 239 (2 Cir. 1962). "Thus, the concept of the unseaworthiness of a ship is a relative one, dependent for definition in each instance upon the circumstances in which her fitness is drawn into question." *Mosley* v. *Cia. Mar. Adra, S. A.*, 314 F. 2d 223, 227 (2 Cir. 1963).

The district court found that the Lt. Robert Craig was unseaworthy because of the unaccounted presence on the No. 2 hatch of the plank of lumber over which Shenker tripped. It held that the presence of such "a random object, not serviceable as dunnage for any stevedoring use," created a "danger, not integral to the necessary operations

of the ship" which in the circumstances rendered the ship less than reasonably fit for its intended use. It has often been held that dangerous and uncertain conditions underfoot may constitute transitory unseaworthiness. See, *e.g.*, *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539 (1960); *Ktistakis* v. *United Cross Navigation Corp.*, 316 F. 2d 869 (2 Cir. 1963); *Pinto* v. *States Marine Corp.*, 296 F. 2d 1 (2 Cir. 1961), *cert. denied*, 369 U. S. 843 (1962); *Blier* v. *United States Lines Co.*, 286 F. 2d 920 (2 Cir.), *cert. denied*, 368 U. S. 836 (1961). The district court here found that in walking on the hatch Shenker and Judice were giving it an intended use because they "were following a customary practice" that was "foreseeable as a likely one by the owner and was consonant with a shipboard procedure recognized as permissible." The holding that the Lt. Robert Craig was unseaworthy, which in any event appellants do not appear to challenge, was therefore entirely proper. The fact that it may have been the responsibility of American Stevedores to remove all excess dunnage does not, of course, relieve the shipowner of its obligation to provide and maintain a seaworthy vessel. That duty is a nondelegable one. *Alaska Steamship Co.* v. *Petterson*, 347 U. S. 396 (1954); *Rogers* v. *United States Lines Co.*, 347 U. S. 984 (1954).

The primary challenge made by appellants is to the holding of the district court that Shenker was entitled to sue upon the shipowner's warranty of seaworthiness because his duties as timekeeper came within the scope of traditional seamen's work. The Supreme Court has held that the shipowner's duty to furnish and maintain a seaworthy vessel is a duty owed not only to seamen but also to longshoremen and stevedores employed by someone other than the shipowner who are injured in the course of their employment aboard the vessel while "doing a seaman's work and incurring a seaman's hazards." *Seas*

Shipping Co. v. *Sieracki*, 328 U. S. 85, 99 (1946); *Reed* v. *Steamship Yaka*, — U. S. — (1963); *Crumady* v. *The J. H. Fisser*, 358 U. S. 423 (1959); *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406 (1953). The answer to the question of whether libelant comes within "that broadened class of workmen to whom the admiralty law has latterly extended the absolute right to a seaworthy ship," *Kermareck* v. *Compagnie Generale Transatlantique*, 358 U. S. 625, 629 (1959), thus depends upon the character of the work he was performing. *United Pilots Association* v. *Halecki*, 358 U. S. 613 (1959); *Lawlor* v. *Socony-Vacuum Oil Co.*, 275 F. 2d 599 (2 Cir.), *cert. denied*, 363 U. S. 844 (1960).

Shenker testified that his duties as timekeeper included keeping the payroll records of the longshoremen gangs employed by American Stevedores at the work site, compiling a "running activity" of "whatever the gangs in the different hatches on the various ships did that particular day—opening the hatch, rigging, starting, opening the 'tween decks or going down to the lower hold, and then starting to load cargo or discharge cargo from the ship," and obtaining every morning a report of the respective amounts of tonnage of different categories of cargo loaded during the prior day. In order to obtain the information for these records, Shenker usually would go aboard ship, he said, "once in the morning and once in the afternoon." In addition, he testified that it was necessary for him to go aboard ship in order to carry out other miscellaneous duties, such as checking the identification number of a longshoreman who might have checked in with the wrong one, checking the type of cargo that was being loaded in a particular hatch, making a record of the stowage of cargo in the different compartments of a hatch, and checking for any damage that might have occurred to cargo.

On the day on which he was injured, Shenker had been instructed by his superior to ascertain when the stevedores

who were working aboard the Lt. Robert Craig would quit work that day. When he was unable to obtain this information by means of telephone calls to the ship, he decided to go aboard to see the foreman in charge in order "to check the time that this gang in hatch No. 1 was going to work, whether they were going to work to finish their work before five o'clock or whether they would go past five o'clock."

On the basis of this testimony, the district court found that the "clerical activities of libelant exposed him in their performance to certain of the hazards which the stevedores encountered in their more laborious output of physical effort" and that he was "an integral participant in the maritime activities of the stevedores" because "all alike were participating in the common maritime undertaking of moving cargo in and out of the vessel." These findings and conclusions are amply justified. The keeping of payroll and cargo records plays an important part in the orderly operation of a ship. In carrying out his duty of keeping such records, as well as in carrying out his miscellaneous duties, all of which required, as the district court found, that he be aboard ship frequently, Shenker performed tasks which are a normal and necessary incident to the effective functioning of the ship. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946); *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406 (1953); *Ross* v. *Steamship Zeeland*, 240 F. 2d 820 (4 Cir. 1957). The district court was therefore correct in holding that he was entitled to the protection afforded by the shipowner's warranty of unseaworthiness.

Appellants also contend that it was error for the district court to exclude from evidence an entry made in the official log book of the Lt. Robert Craig by one Rostock, who was third officer on the ship between the hours of 8 a. m. and 4 p. m. on the day of libelant's accident. The proffered entry read:

"1350—Max Shenker (American Stev. Timekeeper) tripped over batten on #2 hatch and hurt left leg. Was taken to dispensary."

In appellants' view, the log entry had a material bearing on the issue of the cause of Shenker's accident because it tended to establish that he tripped over a batten rather than a piece of dunnage.

Rosteck testified that he did not witness the accident and that the information embodied in the entry came to him "by word of mouth" from "one of the stevedore's bosses on the foredeck." The entry was therefore hearsay and inadmissible as such, as the district court properly concluded. See McCormick, *Evidence* § 225-27 (1954).

Appellants argue, however, that the entry should have been admitted into evidence under the exception to the hearsay rule created by the Federal Business Records Act, 28 U. S. C. § 1732, which makes admissible generally any writing made in the regular course of business as a memorandum or record of an event. Although this argument is not without some force, see 5 Wigmore, *Evidence*, § 1523 (3rd Ed. 1940); *United States* v. *New York Foreign Trade Zone Operators, Inc.*, 304 F. 2d 792 (2 Cir. 1962), we think on balance that the district court was correct in rejecting it on the authority of *Palmer* v. *Hoffman*, 318 U. S. 109 (1943). In that case the Supreme Court upheld a district court's refusal to admit into evidence an accident report offered by the defendant railroad that had been prepared by the engineer of a train involved in a grade crossing accident. The rationale of *Palmer* is directly applicable to the present case. Indeed, it seems likely that the statement held inadmissible in *Palmer* would have been more probative than the log entry excluded in the present case because it was more detailed, and would have been more trustworthy because it was "based on the reporter's first

hand knowledge," McCormick, *Evidence* § 287 (1954), rather than upon the conceded secondhand knowledge that Rosteck relied upon. See *Central R.R.* v. *Jules S. Sottnek Co.*, 258 F. 2d 85 (2 Cir. 1958), *cert. denied*, 359 U. S. 913 (1959). Whatever may be the propriety of using a log entry to prove that an accident actually occurred—and denial of such an opportunity of proof can hardly be deemed prejudicial to appellants—the district court did not abuse its discretion in holding that under the facts of this case the entry might not be used to prove the details of that accident. *Puggioni* v. *Luckenbach Steamship Co.*, 286 F. 2d 340 (2 Cir. 1961).

Having found no merit in any of the arguments raised in opposition to libelant's right to recover, we affirm the judgment in favor of Shenker on the grounds relied upon by the district court and set out above.

II.

We turn now to the appeal taken by American Stevedores from that portion of the district court's opinion granting indemnification to the United States in the amount of Shenker's recovery.

The stevedoring operations aboard the Lt. Robert Craig in the course of which libelant was injured were being conducted by American Stevedores under a contract which it had entered into with the United States. The crucial sections of the agreement touching the liability of American Stevedores, as contractor, provided as follows:

"Clause 12. *Liability and Insurance.*

"a. The Contractor

. . . .

"(2) shall be responsible for and shall hold the Government harmless from any and all loss, damage, liability and expense for * * * bodily injury to * * * persons occasioned in whole or in part by the negligence or fault of the Contractor, his officers, agents, or employees in the performance of work under this contract. The general liability and responsibility of the Contractor under this clause are subject only to the following specific limitations.

"b. The Contractor shall not be responsible to the Government for and does not agree to hold the Government harmless from loss or damage to * * * bodily injury to * * * persons:

"(1) If the unseaworthiness of the vessel * * * furnished by the Government contributed jointly with the fault or negligence of the Contractor in causing such * * * injury * * * and the Contractor, its officers, agents, and employees, by the exercise of due diligence, could not have discovered such unseaworthiness * * * or through the exercise of due diligence could not otherwise have avoided such * * * injury * * *"

The district court held, as a matter of contract interpretation, that the United States was entitled to recovery over from American Sevedores in the amount that it was required to pay to Shenker. It based this result upon two findings of fact which are adequately supported by the record.

First, it found, as we have already noted, that Shenker had been contributorily negligent in failing to watch where he was walking. Second, it found that Judice had been negligent in at least an equal degree with Shenker, "for had Judice been minimally mindful of his footing as he walked beside Shenker on the hatch cover he would surely have

seen the scrap dunnage over which Shenker stumbled, in time to warn him or jostle him out of danger." The effect of these two findings was to render American Stevedores, the employer of Shenker and Judice, liable to the United States under Clause 12a(2) of the contract, which provides for indemnification of the United States for losses for injuries "occasioned in * * * part by the negligence or fault of the [contractor's] employees in the performance of work under this contract," see *Lamazza* v. *United States*, 190 F. Supp. 692 (S. D. N. Y. 1960), and to render inapplicable the exculpatory provision of Clause 12b(1), since the contractor's two employees could, in fact, have discovered the unseaworthiness of the vessel or "through the exercise of due diligence could * * * otherwise have avoided such * * * injury." Once these findings of fact were made, the analysis of the district court fully established the obligation of American Stevedores under the express language of the contract to indemnify the United States. *Santomarco* v. *United States*, 277 F. 2d 255 (2 Cir.), *cert. denied*, 364 U. S. 823 (1960).

The fact that the negligence of Shenker, as the injured employee, was partially responsible for the accident does not preclude the United States from recovery. The language of the contract neither limits to a particular type of employee the negligence upon which indemnification may be based nor excludes the negligence of any particular employee as a factor which may make the indemnification provision operative. To the degree that the recent opinion in *Drewery* v. *Daspit Bros. Marine Divers, Inc.*, 317 F. 2d 425 (5 Cir. 1963), is to the contrary, we agree with the dissenting opinion of Judge Rives. *Id.* at 428. But, in any event, there is no difficulty for purposes of establishing indemnity liability in the present case in imputing the negligence of Judice to his employer, American Stevedores.

The existence of the express warranty makes it unnecessary for us to consider or rely upon principles of implied warranty. *D'Agosta* v. *Royal Netherlands Steamship Co.*, 301 F. 2d 105 (2 Cir. 1962); *Dery* v. *Wyer*, 265 F. 2d 804 (2 Cir. 1959); *cf. Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124 (1956); *Weyerhaeuser Steamship Co.* v. *Nacirema Operating Co.*, 355 U. S. 563 (1958); *Damanti* v. *A/S Inger*, 314 F. 2d 395 (2 Cir. 1963).

Finally, the district court ruled that the United States was entitled to recover from American Stevedores a reasonable award representing the counsel fees, disbursements, costs, and other expenses it incurred in defending against Shenker's claim. This ruling was not improper; expenses such as those here involved are generally recoverable as damages by a shipowner who is awarded indemnity. *DeGioia* v. *United States Lines Co.*, 304 F. 2d 421 (2 Cir. 1962); *Paliaga* v. *Luckenbach Steamship Co.*, 301 F. 2d 403 (2 Cir. 1962); *A/S J. Ludwig Mowinckels Rederi* v. *Commercial Stevedoring Co.*, 256 F. 2d 227 (2 Cir.), *petition for cert. dismissed*, 358 U. S. 801 (1958); *Shannon* v. *United States*, 237 F. 2d 457 (2 Cir. 1956); *Holley* v. *The Manfred Stansfield*, 186 F. Supp. 805 (E. D. Va. 1960).

Affirmed.

FRIENDLY, *Circuit Judge*, dissenting:

The pushing of a "principle or precedent * * * to the limit of its logic" may take it to a point where it collides with another of greater pertinency and applicability. Cardozo, The Nature of the Judicial Process, 30, and *id.* at 43. That, in my view, is the result of holding that a shore-based record keeper, covered by the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. §§ 901-50, who stubbed his toe against a plainly visible board, four

feet long, a foot wide and an inch thick, can recover $25,000 (reduced to half that sum because of his contributory negligence) for unseaworthiness of the ship against the United States—which then receives indemnity from the stevedoring company for sending on board a clerk who took such poor care of himself.[1]

Shenker spent almost all his time on shore. His duties were, in his own words, to keep "a payroll record of the gangs employed on pier two, Brooklyn Army Terminal" and "a running activity of the different ships that were being loaded or discharged * * * so that the company would know just how much cargo to either load or discharge for the purposes of computation of costs." It was on the basis of this "running activity" that the "company in the main office would figure their costs and profits." Occasionally Shenker found it convenient to go on shipboard to get information for his "running activity" record or other purposes.

Thus it was that at 2 P. M. on May 28, 1957, Shenker boarded the Lt. Robert Craig, a naval vessel, "to check the time that this gang in hatch No. 1 was going to work, whether they were going * * * to finish their work before five o'clock or whether they would go past five o'clock * * *", this being important for his closing of the payroll records. The answer reposed in Domenic Judice, the stevedore foreman. To obtain access to Judice, Shenker traversed the well-battened cover of No. 2 hatch. He crossed to the

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[1] Perhaps the circle will be completed by the stevedoring company's recovering from Shenker for breach of his undertaking to keep his eyes open, implicit in his contract of employment. Compare *Malfitano v. King Line, Ltd.*, 198 F. Supp. 399, 401 (S. D. N. Y. 1961), with *Cavelleri v. Isthmian Lines, Inc.*, 189 F. Supp. 525 (S. D. N. Y. 1960), reargument denied 190 F. Supp. 801 (S. D. N. Y. 1961), and *Johnson v. Partrederiet Broviqtank*, 202 F. Supp. 859 (S. D. N. Y. 1962).

halfway point without incident, obtained the desired information and came back, with Judice accompanying him. It was near the completion of this return journey that, as the judge found, rather contrary to Shenker's own testimony,[2] he stubbed his toe against what must have been a plainly visible dunnage board on the hatch cover.

There are at least two reasons, either of them sufficient, why Shenker's recovery against the ship for unseaworthiness ought not be allowed to stand. He was not performing the kind of work for which recovery for unseaworthiness is allowed, and the Lt. Robert Craig was not unseaworthy. I therefore do not reach the question whether exclusion of the entry in the log book was reversible error, or the issues relating to the United States' recovery of indemnity from American Stevedores.

"'[T]he norm of the liability for unseaworthiness has been historically and still is the case of the seaman under contract with the vessel's owner.'" *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 90 (1946). This unusual liabilty is based upon "the hazards which maritime service places upon men who perform it," *id.* at 94, or, as recently stated, upon "the hazards of marine service, the helplessness of the men to ward off the perils of unseaworthiness, the harshness of forcing them to shoulder their losses alone, and the broad range of the 'humanitarian policy' of the doctrine of seaworthiness * * *", *Reed v. The Yaka*, 373 U. S. 410, 413 (1963). Since "Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew", a man engaged in such service is entitled to the benefit of

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[2] The judge rejected this on the ground that Shenker's "claims to total kinesthetic recall of his immediately antecedent bodily gyrations" were "mere reconstructed imagery by a glib but inexperienced witness," who "seemingly had not earlier or, perhaps, sufficiently been admonished by counsel that not all questions put to him need be factually answered."

the rule even though he is "employed and furnished by another." 328 U. S. at 96. This is so although a contrary result would not at all force him to shoulder his loss alone in view of the remedy against his employer which Congress has provided in the Compensation Act.

Although the historicity of the pronouncement in *Sieracki* that the work of loading and unloading was historically done by the ship's crew has been seriously challenged, see Tetreault, Seamen, Seaworthiness, and the Rights of Harbor Workers, 39 Corn. L. Q. 381, 413-14 (1954), that would not avail the shipowner in an inferior federal court in a case directly within that decision. However, the dubious historical basis for thus giving harbor workers the protection of the warranty of seaworthiness (as distinguished from their rights on account of negligence of the shipowner), the present inapplicability to harbor workers of some of the factors which underlay the development of the doctrine as regards "seamen" in the ordinary sense, the frustration of the policy of the Longshoremen's and Harbor Workers' Compensation Act resulting from combining the principle that a stevedore may recover from the ship for defective gear brought on by his employer, *Alaska S. S. Co. Petterson*, 347 U. S. 396 (1954), with the liability of the employer to indemnify the ship for this or other negligent action on its part. *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp.*, 350 U. S. 124 (1956), and the complexities presented in a trial, and particularly in a jury trial, of the typical three party case, argue against our

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[3] See, *eg.*, *Mosley v. Cia. Mar. Adra, S.A.*, 314 F. 2d 223 (2 Cir. 1963); *Damanti v. A/S Inger*, 314 F. 2d 395 (2 Cir. 1963). These complexities will be further increased by development of the law as to cross-claims by the stevedore-employer against the ship, see *Pettus v. Grace Line, Inc.*, 305 F. 2d 151, 156 (2 Cir. 1962) (dissenting opinion of Judge Clark); *Williams v. Pennsylvania R.R.*, 313 F. 2d 203 (2 Cir. 1963); *Watkins v. Farrell Lines Inc.*, 315 F. 2d 418 (2 Cir. 1963),—not to speak of claims by the employer against the employee, see note 1, *supra*.

applying the warranty of seaworthiness to a shore-based office worker unless decisions of the Supreme Court call for that. There is still great wisdom in the admonition of Judge Learned Hand that "we should hesitate to read the [Sieracki] decision as intended to extend the protection of what amounts to a warranty of seaworthiness to all workmen upon a ship, however casual their presence there, and however much their relation to the employer is unlike the early paternalistic status of master and crew * * *", and that any such extension "should await the sanction of the Supreme Court in the exercise of its function of supplying the inadequacies of the past." *Guerrini* v. *United States*, 167 F. 2d 352, 354 (2 Cir.), cert. denied, 335 U. S. 843 (1948).

The relevant Supreme Court decisions subsequent to *Sieracki* tell us only that a carpenter repairing defective loading equipment "so that the loading could go on at once" is assimilated to "the stevedores then working with him on the ship * * *." *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 412-13 (1953), and *The Tungus* v. *Skovgaard*, 358 U. S. 588, 595 n. 9 (1959), but that a shore-based electrician cleaning the ship's generators in an engine room is not, *United Pilots Ass'n* v. *Halecki*, 358 U. S. 613 (1959). Insofar as application of the warranty of seaworthiness rests on "the hazards of marine service" and "the helplessness of the men to ward off the perils of unseaworthiness," Shenker's case is far weaker than Halecki's, who was spraying the ship's engines with a deadly poison; it is almost ludicrous to apply the quoted phrases to a man who spent almost all his time on shore and only needed to look where he was going to keep himself entirely safe on this occasional adventure in shipboard. The *Halecki* opinion, 358 U. S. at 618, also dispels any notion that Shenker is entitled to the benefit of the doctrine on the simple ground that he was a record keeper and ships carry some

men who keep records. The records that Shenker was keeping were not the kind of records historically kept by the ship's crew; rather they were the very kind that would not have been kept if the ship's crew had carried out their supposed historical function of loading her. Shenker, like Halecki, "was not doing what any crew member had ever done on this ship or anywhere else in the world so far as we are informed." Judge Lumbard's dissenting opinion, 251 F. 2d 708, 715 (2 Cir. 1958), quoted with approval, 358 U. S. at 618. Hawn's and Skovgaard's roles were quite different. If it was traditional for a ship's crew to load, we must take it to have been, presumably it was equally traditional for the crew to fix loading equipment that had broken down. But it can scarcely have been traditional for the crew to keep records needed to bill the ship for services of third persons that traditionally were not rendered. Although Shenker's activities may have been essential to the ship's being unloaded by a third party, they would not have been required if the ship had unloaded herself; the consideration stressed in *Sieracki*, "that the owner should not be free to nullify" his obligation as to seaworthiness "by parcelling out his operations to intermediary employees whose sole business is to take over portions of the ship's work," 328 U. S. at 95, scarcely applies to him.

Even if Shenker were entitled to the benefit of the doctrine of unseaworthiness, I would still reverse on the ground that the judge erred in concluding that the presence of a plainly visible piece of dunnage on the hatch cover rendered the Lt. Robert Craig unseaworthy. We have consistently held that unseaworthiness, like negligence, is a question of law not within the scope of the "unless clearly erroneous" rule or its admiralty equivalent. *Krieg* v. *United States*, 123 F. 2d 1008 (2 Cir. 1941); *Van Carpals* v. *S.S. American Harvester*, 297 F. 2d 9 (2 Cir. 1961), cert. denied, 369 U. S. 865 (1962); cf. *Romero* v. *Garcia & Diaz*,

Inc., 286 F. 2d 347, 355 (2 Cir.), cert. denied, 365 U. S. 869 (1961). The Lt. Robert Craig was not a passenger liner; she was a naval vessel in the course of being loaded. She did not cease to be "reasonably suitable for her intended service," *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 550 (1960), simply because her hatch covers were not so free from every kind of obstruction as a bowling alley or the floor of an operating room awaiting surgery. *Nuzzo* v. *Rederi, A/S Wallenco*, 304 F. 2d 506 (2 Cir. 1962). The facts bear no resemblance to the conditions of disarray in *De Gioia* v. *United States Lines Co.*, 304 F. 2d 431, 423 (2 Cir. 1962), or to the "accumulation of oil covered by sawdust" in *Ktistakis* v. *United Cross Navigation Corp.*, 316 F. 2d 869 (2 Cir. 1963).

I would reverse with instructions to dismiss the libel.

Opinion of Rosling, D.J., May 29, 1962.

Appearances:

Fuchsberg & Fuchsberg, Esqs., Proctors for Libelant, Stanley Danzig, Esq., Of Counsel.

Joseph P. Hoey, Esq., United States Attorney, Eastern District of New York, Proctor for Respondent, Clare Walker, Esq., Assistant U. S. Attorney, Of Counsel.

George J. Conway, Esq., Proctor for Respondent-Impleaded.

ROSLING, J.:

On May 28, 1957, libelant Shenker, while aboard the Lt. Robert Craig (the "Craig") a naval vessel of the respondent United States of America, suffered injuries from a fall. In this action for resultant damages, it is determined that respondent is liable by reason of the relevant unseaworthiness of the Craig, but that libelant's own fault contributed in equal degree to the accident. With allowance having accordingly been made proportioned to such comparative responsibility of the parties, libelant is awarded the sum of twelve thousand five hundred dollars.

In respect of the claim over by respondent against American Stevedores, Inc. ("American"), impleaded respondent, the court, in conformity with a direction made by it at the close of the evidence tendered upon libelant's primary cause of action, will meet with counsel for both respondents to arrange procedures for disposition of the residual issue of liability, *inter se*. Entry of judgment as to all parties will await adjudication of such pendent issue.

Findings of fact and conclusions of law touching the matters thus far decided are recited in the following.

On May 22, 1957, the Craig, owned by the United States, and operating in its Military Sea Transportation Service, was moored with starboard side to a pier at the Brooklyn Army Terminal. There it remained through May 28th while American, under governmental contract, dis-

charged and loaded the vessel's cargo. The task was performed by stevedores in American's employ, who in such activity came upon the vessel, entered its hatches and holds, manipulated its booms and winches and on at least one occasion traversed its deck area from starboard to port, across the hatch which was later the scene of libelant's accident, to reach and board a lighter lying alongside and serving as an auxiliary in the task in hand.

Shenker was American's timekeeper, with his "office" established in a nearby cubicle ashore. Routinely engaged in keeping records, he busied himself with the compilation of statistical data concerning the stevedoring gangs, their work in loading and discharging, the opening of hatches and the stowage of cargo, the quantities stowed, damage to cargo, weather conditions, accidents, injuries, and the like. While much of what he was called upon to do was clerical and documentary, and could as well have been accomplished without his setting foot outside his shoreside headquarters, the gathering of some of the information described entailed his visual inspection of the relevant procedures aboard. It was the performance of one such function which involved him in the accident forming the basis of his claim. His superior, Perrone, had on May 28th instructed him to ascertain when the stevedores who were working aboard the Craig would quit work that day. Shenker initially resorted to telephone calls to the ship to obtain this information. The telephone had not answered. He, accordingly, decided to go aboard for personal consultation with one Judice, American's foreman in charge of the stevedores who were thus engaged.

Such procedure by libelant is found by the court to have fallen within the range of his duties, and to have been neither unusual nor unreasonable under the circumstances. His presence aboard, therefore, was an integral participant in the maritime activities of the stevedores and assimilated their status as of a person engaged in the ship's service.

These men were at the time, stowing cargo under Judice's direction in a hold in the forepart of the ship.

To its own crew liability for injuries arising from the hazards of their marine service rests upon the shipowner's obligation to maintain a seaworthy vessel. The obligation is absolute in character and generates a species of liability without fault, not dependent in any sense up on the owner's prior knowledge or notice of the causative condition or deficiency disqualifying the vessel as seaworthy. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 94 (1946); *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539, 549 (1960); *Van Carpals* v. *S.S. American Harvester*, 297 F. 2d 9 (2d Cir. 1961); *Massa* v. *C. A. Venezuelan Navigacion*, 298 F. 2d 239 (2d Cir. 1962). "[T]he work of loading and unloading is the work of the ship's service" and the stevedore so engaged "is entitled to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner. For these purposes he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards." *Seas Shipping* v. *Sieracki*, *supra*. The clerical activities of libelant exposed him in their performance to certain of the hazards which the stevedores encountered in their more laborious output of physical effort, but all alike were participating in the common maritime undertaking of moving cargo in and out of the vessel, and all in equal degree were entitled while so employed to a seaworthy vessel. Cf. *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406 (1953); *Lawlor* v. *Socony Vacuum Oil Co.*, 275 F. 2d 599, 602 (2d Cir. 1960), cert. denied, 363 U. S. 844 (1960); *The Buena Ventura*, 243 Fed. 797 (S. D. N. Y. 1916); *The D. C. Salisbury*, 7 Fed. Cas. 279 (S. D. N. Y. 1844); *A. L. Mechling Barge Line* v. *Bassett*, 119 F. 2d 995 (7th Cir. 1941); *Wilkes* v. *Mississippi River Sand & Gravel Co.*, 202 F. 2d 383 (6th Cir. 1953), cert. denied, 346 U. S. 817 (1953); *Jeffrey* v. *Henderson Bros.*, 193 F. 2d 589 (4th Cir. 1951).

The hatch (designated "No. 1"), where American's stevedores were loading cargo, was located on the forecastle tween deck, the floor of which was some nine feet above the main deck. From this it was set off by an unpierced watertight bulkhead running athwart the vessel for its entire width at that point. Two ladders, one near the port, and the other, the starboard side, of the boat gave access from the main to this raised forecastle deck. Five feet two inches aft of such bulkhead was the forward end of the No. 2 hatch, where the accident, as it will later be shown occurred. This hatch was rectangular in shape, being 24 feet in length and 22′ 4″ wide. Its peripheral coaming reached a height of 30″ above the adjacent main deck. Longitudinally, its sides extended forward at that height beyond its forward end to meet the forecastle bulkhead with which it formed what a witness aptly described as a "well". Structures within such well encroached substantially upon its available deck area. These, coupled with the boxed-in effect produced by the elongation of the coaming, foreclose a holding that one intending to proceed from starboard to port, as did libelant in the circumstantial sequence of events entering into his accident, might reasonably be required to consider as a feasibl route this narrow space aft of forecastle bulkhead.

Some thirty feet abaft of the No. 2 was the No. 3 hatch, equal to it in width, and one-half again as long. Such area between these hatches was occupied by a crowded clutter of winches, control boxes, padeyes, pipes and other machinery; as well as a mast house, lockers and superstructure. In addition to these permanent fixtures the presence of ship's gear and spattered slush oil or grease which had been applied to the drums of the winches increased the risk for one unfamiliar with the vessel who might choose to thread his way amid this huddle of marine furniture in proceeding from one side of the ship to the other across the deck at this point.

This, then, was the setting for libelant's misadventure when shortly before 2:00 P. M. on May 28th he ascended the vessel's starboard accommodation ladder at a point in the vicinity of the No. 3 hatch, and turning right, walked forward along the main deck toward the raised forecastle. He was looking for Judice, having come on the mission of inquiry Perrone had committed to him. The timekeeper's progress in his quest had carried him half or more of the length of hatch No. 2 when beyond its farther edge he spied the supervisor of longshoremen whom he sought. Judice was at such moment walking aft on the portside of the main deck. Yelling to Judice to make himself heard above the din of shipboard and river activities, Shenker succeeded in attracting the other's attention. Judice in acknowledgment beckoned to him and mounted the hatch from its portside. Libelant followed suit on his own (starboard) side, and the two men then advanced toward each other on the hatch cover to meet at approximately its center.

The hatch had been opened the day before to enable the longshoremen to work the cargo in the hold beneath. Having completed their task in the late afternoon, they had replaced the covering pontoons, and over these had thrown the protective tarpaulins. These, as their final procedure, they had weighted down with several battens (steel rods) which they had arranged lengthwise on the surface, but had otherwise not secured.

In the course of the following morning (the 28th) the ship's crew, as was its custom and recognized duty, battened down the hatch in shipshape fashion, the procedure being as follows: They had drawn the tarpaulins taut and then wedged them with battening wedges driven at intervals into a slot that ran around the coaming. The steel battens, four in number, each consisting of two sections, were next placed athwartship over the tarpaulins and hooked into the sides of the coaming to grip it. Finally, the two sections of each batten were joined admid-

ships on the hatch cover by a turnbuckle which served to tighten the grasp of the rods. This accomplished, the turnbuckles protruded several inches above the surface.

When the No. 2 hatch had thus been battened down, its level had been raised thereby an additional ten inches from the top of the coaming to a height of forty inches above the main deck. No step or ladder led from the deck to such upper surface, although a ledge extending horizontally for perhaps six and a half inches ran around the perimeter of the hatch at the top of the coaming thirty inches above the deck. This could serve as a toe hold for one endeavoring to mount the hatch. Whether libelant and Judice had utilized the ledge for such purpose on this occasion does not clarly appear.

It does, however, sufficiently appear that in thus availing themslves of the hatch area in passing from one side of the vessel to the other they were following a customary practice, and, lacking, by reason of the conditions earlier noted, a clearly defined and reasonably safe alternative route, their procedure was not unreasonable. Both crew and longshoremen from time to time, as occasion compelled, had had recourse to the hatch surface for pedestrain and related purposes. Such use was thus forseeable as a likely one by the owner and was consonant with a shipboard procedure recognized as permissible. There was thus cast upon the owner the duty of maintaining this shipboard facility in seaworthy condition for its anticipated shipboard function. Liability for unseaworthiness is commonly held to exist "where the shipowner, having knowledge—actual or constructive—that certain activity will occur [fails in fulfillment of his] absolute duty of supplying equipment for permitting the conduct and accomplishment in reasonable safety of that activity" (citing cases). *Mesle* v. *Kea Steamship Corp.*, 260 F. 2d 747, 751 (3d Cir. 1958), cert. denied, 359 U. S. 966 (1959); *Buch* v. *United States*, 220 F. 2d 165 (2d Cir. 1955); *Krey* v. *United States*, 123 F. 2d 1008

(2d Cir. 1941); *Bentley* v. *Albatross S. S. Co.*, 203 F. 2d 270 (3d Cir. 1953); *The Leontios Teryazos, Szanti* v. *Teryazos*, 45 F. Supp. 618, 622 (E. D. N. Y. 1942); *Campbell* v. *Tidewater Associated Oil Co.*, 141 F. Supp. 431, 434 (S. D. N. Y. 1956).

After a brief discussion in which the duration of the cargo operations in hatch No. 1 was the subject of estimate, the two men walked toward the aft end of the hatch cover. Then turning to face starboard, they proceeded on the hatch toward its longitudinal edge. It was libelant's intent to regain the deck by "squatting" down and then "easing" his legs off on to the adjacent deck floor.

When, however, Shenker had come to within a few feet from such starboard side of the cover, he unexpectedly stubbed his toe against a piece of dunnage which was lying on the hatch and which he had not earlier seen. In stumbling, he kicked the plank into the air. In dimension it was about four feet long, a foot wide and an inch thick. Timekeeper and lumber tumbled to the deck together, libelant pitching forward heavily with the board dropping beside him.

Respondent argues forcefully that libelant's version of certain of the circumstances of his fall fly in the face of what is physically possible. Shenker had, so he testified, walked to the starboard edge of the hatch intending to dismount, but had come to a full halt with weight equally distributed on both feet as he started to squat down. It was while thus engaged that he stubbed his toe and tumbled forward and down. Granting the truth of libelant's description of his posture—off balance in consequence of his preparatory bending to one side and stooping—we must nevertheless acknowledge that the absence of forward momentum at this precise instant before his fall renders visualization of the circumstantial sequence difficult, if not impossible. Judice, on the other hand, depicts a routine prologue of events wholly consistent with the single in-

controvertible fact, namely, that libelant *did* fall from the hatch to the deck. Judice's testimony has Shenker walking beside him after their conference to a point three or four feet from the edge of the hatch. There Shenker tripped over the plank *without ever having paused or stopped his walk at any time.*

The gravamen of libelant's cause of action is that the vessel had been rendered unseaworthy by reason of the purposeless and dangerous presence of a piece of lumber on the hatch cover, constituting the proximate cause of his stumbling fall and ensuing injuries. His claims to fotal kinestlietic recall of his immediately antecedent bodily gyrations the court rejects as mere reconstructed imagery by a glib but inexperienced witness. He seemingly had not earlier or, perhaps, sufficiently been admonished by counsel that not all questions put to him need be factually answered. The court's crucial finding, however, reinains unimpaired, notwithstanding libelant's inadequacy in testimonial expertise. He testified that he had stumbled over a plank, improperly placed, and fallen. The court accepts this fact as fully established.

The piece of wood had been a random object, not serviceable as dunnage for any stevedoring use. Its presence on the hatch was left unaccounted for. A danger, not integral to the necessary operations of the ship, was thereby created. In such circumstance and to that exent the vessel was rendered unseaworthy.

It avails repsondent naught in attempted extenuation or exoneration of liability that the condition cited by libelant as rendering the vessel unseaworthy, was of a transitory nature, created by persons unknown, perhaps even by the stevedores themselves; nor that respondent had neither actual nor constructive notice of its existence; nor, indeed, an opportunity, reasonable or sufficient, to correct it. Decisions supporting each of these propositions are noted in the following. They derive inevitably and by an apodictic logic from the thesis of *Sieracki, supra*, that

the obligation of seaworthiness affords an all-embracing aegis for those aboard ship who are injured while rendering to the ship the traditional services of seamen. Liability in such situation attaches irrespective of fault, and is absolute and unlimited by any conceptions of negligence. The principle finds its economic basis and legal definition in the court's pithy observation (*Seas Shipping Co.* v. *Sieracki*, *supra*, p. 94) that the owner "is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost." Accordingly, it has been uniformly held that want of notice of the unseaworthy condition does not exonerate (*supra*, p. 4). By logical extension of this principle the courts have cast an owner in judgment notwithstanding no opportunity has been afforded it to remedy the defect prior to the occurrence of the accident it has occasioned. *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539 (1960); *Carabellese* v. *Noviera Aznar, S. A.*, 285 F. 2d 355 (2d Cir. 1960); *Rich* v. *Ellerman & Bucknall S. S. Co.*, 278 F. 2d 704 (2d Cir. 1960). The fact that unseaworthiness is ascribable to improper equipment brought aboard by the stevedores themselves for the performance of the maritime functions, or even to the negligent procedures of the very person who grounds his claim to redress upon such unseaworthy condition, does not relieve the owner of its nondelegable responsibility for the security of its vessel. *Grillea* v. *United States*, 232 F. 2d 919 (2d Cir. 1956); *Grzybowski* v. *Arrow Barge Co.*, 283 F. 2d 481 (4th Cir. 1960). Once properly categorized as a present state or context of unseaworthiness, how long such condition has endured is irrelevant. Neither recency of origin nor uncertainty as to the causal agency exonerate. Thus in *Grzybowski*, *supra*, the Court of Appeals held (p. 486) as reversible error instructions to a jury by the lower court that "[t]he doctrine of unseaworthiness does not extend so far as to require the owner to keep the appliances or work spaces which are inherently sound and seaworthy absolutely free at all times

from transitory, occasional, immediate unsafe conditions resulting from their use." Such instruction, the appellate court noted, "was in conflict with the Supreme Court's pronouncement in *Mitchell* v. *Trawler Racer, Inc., supra*, at p. 550 that 'what has evolved is a complete divorcement of unseaworthiness from concepts of negligence.'"

Thus, also, in *Poignant* v. *United States*, 225 F. 2d 595 (2d Cir. 1955), our Circuit Court, rejecting a stewardess' claim under the Jones Act for want of proof of the elements, hereinafter enumerated, of negligence charged by her to the respondent as the cause of her injuries sustained—(she had stepped on an apple skin in a passageway through which garbage cans were pulled for dumping)—nevertheless found liability to exist on an alternate cause of action which alleged unseaworthiness. The court posed as crucial for answer in arriving at its determination the question (p. 597) whether "the [transitory] presence of an apple peel on the floor of a public corridor in the vessel constitute[d] an unseaworthy condition, for the harmful effect of which the owner is absolutely liable to a member of the crew." Citing the case of *Alaska S. S. Co.* v. *Petterson*, 347 U. S. 396 (1954), the court found in it (p. 598) support for the proposition that unseaworthiness may exist notwithstanding a showing "that the existence of such a condition was not brought to the knowledge of the owner or that he lacked opportunity to prevent or correct the condition."

Libelant's claim, insofar as it rests upon an allegation that respondent was negligent, must, however, be disallowed for failure, at least, of any showing of a sufficiency of proof that notice, actual or constructive, of the dangerous condition was given to such party, and the lapse of an interval thereafter, the duration of which was reasonably sufficient for the taking of remedial measures. *Poignant* v. *United States*, *supra*, p. 596.

It does not avail respondent, moreover, to urge as reason for its complete exoneration that libelant with a broad

expanse of hatch open for his safe traverse chose the path which led to peril. For the owner had neither by notice nor by special structure undertaken to restrict one using the area to a safer route. Every route was, accordingly, equally eligible for one engaged in the ship's business, and the path so selected was perforce the one the owner was charged with the duty of keeping safe.

Similarly, the existence of passageways other than across the hatch does not absolve respondent from liability, even though these might have been used by libelant with a lesser risk of injury. The Court does not find upon the proof presented to it that any such alternative, giving promise of greater safety, was reasonably open to libelant in the circumstantial context of his visit to the ship. In any event an imprudent choice by him would not deny him a right of recovery, though it may serve to diminish by reason of such personal fault the award his injuries might otherwise entitle him to. *Palermo* v. *Luckenbach Steamship Company*, 355 U. S. 20 (1957). Cf. *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424 (1939); *Guerrini* v. *United States*, 167 F. 2d 352 (2d Cir. 1948), cert. denied, 335 U. S. 843 (1948); *Santomarco* v. *United States*, 1959 A. M. C. 1808 (E. D. N. Y.), aff'd 277 F. 2d 255 (1960), cert. denied, *sub. nom. American Stevedores, Inc.* v. *United States*, 364 U. S. 825 (1960).

Contributorily negligent libelant most assuredly was, and that in substantial measure. His very unfamiliarity with the vessel which serves him in his disclaimer of knowledge of routes less perilous than the one he selected, called upon him to exercise a commensurately greater caution. The multiple functions of the hatch should have taught him to be alert to the possibility that the ship's utilization of the facility for purposes other than pedestrian had rendered it less safe for his traverse than had it been availed of for no other use. A minimal regard for his own safety demanded that he look about him as he walked in alien surroundings—not in the unobservant

fashion he adopted wherein he was oblivious to lurking danger underfoot. The court has, accordingly, found libelant guilty of a negligence which contributed to the occurrence of the accident in equal measure with the unseaworthiness for which the respondent has been adjudged liable. The award has been computed on the basis of such comparative culpability at the sum set forth in the opening paragraph of this opinion.

Damages

Libelant's chief injury sustained in his fall was a fracture of the neck of the right femur, requiring open reduction and internal fixation. Sixty-two years of age at the date of his accident, he required a lengthy period of hospitalization and medical after care. He now remains with permanent disabilities, the most significant being a loss of mobility and ambulatory power evidenced by a marked limp. A hospital bill of $1,005 was stipulated. Loss of earnings resulted from enforced absence from employment by reason of the injuries suffered is estimated by the Court at approximately $2,000, at the rate of $126 a week. At the time of the trial it appeared that libelant had long since resumed his employment with earnings unimpaired and, in fact, increasing thereafter. The tasks he is called upon to perform in such employment appear to fall within his physical competence notwithstanding his disability. The items of special damage cited, to which the court adds compensation for pain, suffering, a permanent injury, disfigurement and disability, justify just as a reasonable estimate of plaintiff's claim the sum of $25,000. This sum, as earlier noted, is in the computation of the award to which libelant is entitled, diminished by one-half by reason of libelant's own negligence determined by the court to have contributed to the occurrence of the accident to the extent of fifty percent.

GEORGE ROSLING,
U. S. D. J.

Opinion of Rosling, D. J., September 11, 1962.

Appearances:

Fuchsberg & Fuchsberg, Esqs., Proctors for Libelant; Stanley Danzig, Esq., of Counsel.

Joseph P. Hoey, Esq., United States Attorney, Eastern District of New York, Proctor for Respondent; Clare Walker, Esq., Assistant U. S. Attorney of Counsel.

George J. Conway, Esq., Proctor for Respondent-Impleaded.

Rosling, J.:

The respondent, United States of America (government), is entitled to recovery over against American Stevedores, Inc., respondent impleaded (American), requiring it to pay the amount which the government is required to and does pay to plaintiff, Maxwell Shenker, pursuant to decree to be entered herein in favor of said plaintiff and against the government in conformity with opinion of this Court dated May 29, 1962. In addition thereto the government is entitled to recover from American reasonable attorneys' fees for, and expenses incurred in, the defense of this action, together with costs and disbursements thereof. If the government and American do not stipulate between them upon an agreed amount of attorneys fees and expenses and file such stipulation prior to the date fixed below, this matter is set down for the taking of proof on October 2, 1962, at 4:00 P. M. The stipulation of the parties; if filed, shall be deemed to have been filed in lieu of formal proof of the amounts specified therein, but shall not, unless the parties otherwise provide, operate, except as to a finding that such amounts are reasonable, as a waiver of any rights the parties to the stipulation may have as to the matters in controversy in this action.

The findings of fact and conclusions of law [1137] hereinafter recited are in supplementation of those set forth in the opinion above mentioned.

The stevedoring operations aboard the S. S. Craig in the course of which plaintiff, at the time an employee of American, was injured were conducted by American under a contract it had entered into with the government. The pivotal provisions touching the contractor's liability over are the following:

"CLAUSE 1. *General Scope of the Contract*

"Item 1. Stevedoring Loading and Unloading (Vessel Operations)

"a. *General.* The Contractor shall load and discharge cargoes and in connection therewith shall perform all the duties of a stevedore on any vessel[1] which the Contracting Officer may designate at the Brooklyn Army Terminal or any pier or anchorage in the New York Harbor area upon the terms and conditions hereinafter set forth for the term of this contract, beginning 1 February 1957 and ending 31 December 1958, provided however, that any work started before and not completed by the expiration of this contract shall be governed by terms of this contract unless otherwise directed by the Contracting Officer.

* * * * * *

"CLAUSE 12. Liability and Insurance.

"a. The Contractor

* * * * * *

(2) shall be responsible for and shall hold the Government harmless from any and all loss, damage, liability and expense for * * * bodily injury to * * * persons occasioned either in whole or in part by the negligence or fault of the Contractor, his officers, agents, or employees in the performance of work under this contract. The

[1] The Craig was such vessel.

general liability and responsibility of the Contractor under this Clause are subject only to the following specific limitations.

"b. The Contractor shall not be responsible to the Government for and does not agree to hold the Government harmless from loss or damage to * * * bodily injury to * * * persons:

"(1) If the unseaworthiness of the vessel * * * furnished by the Government contributed jointly with the fault or negligence of the Contractor in causing such * * * injury * * * and the Contractor, its officers, agents, and employees, by the exercise of due diligence, could not have discovered such unseaworthiness * * * or through the exercise of due diligence could not otherwise have avoided such * * * injury * * *.

"(2) If the * * * injury * * * resulted solely from an act or omission of the Government or its employees or resulted solely from proper compliance by officers, agents, or employees of the Contractor with specific directions of the Contracting Officer."

The Court rested its determination[2] in plaintiff's favor upon a finding that the Craig was rendered unseaworthy by the presence on the cover of hatch No. 2 of a random piece of lumber. The Court in arriving at such conclusion rejected plaintiff's contention that the government was negligent by reason of such presence, holding that no sufficient proof of notice to the government, actual or constructive, of the dangerous condition, had been adduced. The Court determined, however, that Shenker in undertaking to walk over the hatch cover, a pedestrian use by him on American's business proper under the contract, without his taking visual note of possible danger in his

[2] Opinion of May 29, 1962.

[3] *Poignant* v. *United States*, 225 F. 2d 595, 596 (2d Cir. 1955).

path, was guilty of negligence contributing to his fall and resultant injuries. By such want of care he involved his employer American in the commitment to indemnify the government under the contract provision, for the injury is thus subsumed to be one "occasioned in * * * part by the negligence or fault of the (Contractor's) * * * employees in the performance of work under this contract."[4] Further, such negligence on Shenker's part renders inapplicable the exculpatory clause saving American from liability to indemnify "[i]f the unseaworthiness of the vessel * * * contributed jointly with the fault or negligence of the Contractor in causing such * * * injury * * * *and* the (Contractor's) employees could *not* have discovered such unseaworthiness * * * or through the exercise of due diligence could *not* otherwise have avoided such * * * injury * * *." (Italics supplied)[5]

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[4] Contract Clause 12(a)(2).

[5] That the injured person's own contributory negligence should serve as the fulgrum upon which American's obligation to indemnify turns, satisfying, as it does, by exact definition, the postulated "fault or negligence of the employee" should not dismay us in this never never land of overlapping liabilities. A longshoreman who may not in face of § 905 of Longshoremen's and Harbor Workers' Compensation Act sue his employer, is, yet, permitted to cite the owner of the ship who has contracted for his services. The owner may in such event find himself cast in damages by reason of the unseaworthiness of a vessel, and, indeed, made unseaworthy through the negligent act of the very longshoreman who sues for the injuries his own carelessness occasioned. *See: Grillea* v. *United States*, 232 F. 2d 919, 923 (2d Cir. 1956); *Holley* v. *The Montrod Stansfield*, 186 F. Supp. 212 (E. D. Va. 1960); *Johnson* v. *Partrederiet Brovigtank*, 202 F. Supp. 859 (S. D. N. Y. 1962); *Smith* v. *Lauritzen*, 201 F. Supp. 663 (E. D. Pa. 1962); *Contra Holmes* v. *Mississippi Shipping Co.*, 301 F. 2d 474, citing cases (5th Cir. 1962). The owner in turn may seek, and obtain reimbursement from the stevedore employer of the injured longshoreman. Finally, the wheel of litigation may come full circle when, as latterly, the stevedore with varying success asserts a common law claim for reimbursement against his employee as the one whose initial wrongdoing set the whole preposterous chain of litigation in motion. *See: Waltuano* v. *King Line, Ltd.*, 198 F. Supp. 899 (S. D. N. Y. 1961); *Cavaliere* v. *Isthmian Lines, Inc.*, 189 F. Supp. 525 (S. D. N. Y. 1960), 190 F. Supp. 801 (Reargument denied 1961).

A contractor's obligation to hold a shipowner harmless may arise under the express language of an agreement between them or may flow as an implication from the contractor's obligation that performance by him shall be workmanlike.[6] Approximately the terms of the contract here under consideration are the provisions passed upon by the Court in *Santomarco* v. *United States*, 1959 Am. Mar. Cas. 1808 (E. D. N. Y. 1959 not otherwise reported) aff'd 277 F. 2d 255 (2d Cir. 1960) cert. denied sub nom. *American Stevedores, Inc.* v. *United States*, 364 U. S. 823 (1960) in which Judge Zavatt of this court held the United States liable under maritime law because libelant's injuries were the result of an unseaworthy condition of the deck—(oil had run from a leaking winch across the deck forming a slick in which he had fallen)—but charged to the plaintiff a measure of contributing negligence "because he proceeded through an area of known danger without reporting or acting to remove the oil from the deck." The opinion of the Court of Appeals reads in its pertinent portion as follows:

> "The liability, so reduced, the judge imposed on 'Stevedores' under its contract to indemnify the United States, which therefore became only secondarily liable. That contract provided that 'Stevedores' would 'hold the Government harmless from any loss * * * for bodily injury * * * of persons'; but to this engagement there were two exceptions of which only the first is relevant here. This exception absolved 'Stevedores,' if 'the unseaworthiness of the vessel

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[6] *Pettus* v. *Gra e Line, Inc.* (Civil No. 27209, 2d Cir., June 27, 1962); *Drago* v. *A/S Inger* (Civil No. 27231, 2d Cir., July 3, 1962). See also *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co., Inc.*, 355 U. S. 563, 567 (1958); *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124 (1956); *Cramady* v. *The J. H. Fisser*, 358 U. S. 423 (1959); *Santomarco* v. *United States*, *supra*, p. 6.

or failure or defect of gear or equipment furnished by the Government contributed jointly with the fault or negligence of the Contractor * * * and the Contractor, its officers, agents, and employees, by the exercise of due diligence could not have been [sic] discovered such unseaworthiness or defect of gear or equipment or through the exercise of due diligence could not otherwise have avoided' the injury. In this case it was the 'unseaworthiness' of the ship that 'contributed jointly with' a 'fault or negligence of the contractor,' because the spot of oil was evident to employees of 'Stevedores' other than the libellant, who were at work thereabouts, and who did not call the attention of any of the ship's company to it, or ask to have it wiped up or sprinkled with sawdust. Moreover, if that would not have 'avoided' the injury—which there is every reason to suppose that it would—by the 'exercise of due diligence' they could have wiped up the oil themselves. Hence 'Stevedores' is liable for any recovery."

The Court of Appeals affirmed.

Here, Judice, the American's gang foreman aboard the Craig, was at least in equal fault with the less experienced timekeeper plaintiff, for had Judice been minimally mindful of his footing as he walked beside Shenker on the hatch cover he would surely have seen the scrap dunnage over which Shenker stumbled, in time to warn him or jostle him out of danger. In the context of these events both notice of existing danger and opportunity for giving warning were sufficient to charge American as negligent. That a passive fault arising from a nondelegable obligation to maintain a seaworthy vessel so that libelant might be afforded a safe place in which to perform his duties subjects the shipowner to liability

does not avail American in exoneration. Its contractual and common-law duties alike command it so to act as to eliminate the danger as to which it has notice and opportunity for remedial action.[7]

Nor do the cases cited by American stead it. Rather do they lead to others which point up in sharper relief the distinctions tending to its disadavantage. In the *Mancini* case[8] the Court found libelant free of contributory negligence in justifiably relying on inspection and repairs earlier made by representatives of the respondent United States which was, accordingly,[9] denied a right of recovery over. In Piscopo[10] not only did the Court hold the plaintiff wholly without fault, but such finding was grounded upon a showing that he had relied upon an assurance given him by the army foreman of defendant United States that the equipment to which plaintiff had objected would be replaced.[11] Significantly the Court remarked that "The distinction is clear between such state of affairs (as it had under consideration) and that examined in *United States* v. *Arrow*, 175 F. 2d 329 (9th Cir. 1949), upon which the government relies. There an insecure hatch cover fell and caused the injury complained of; the Court held that the duty to indemnify arose because the stevedore permitted its men to proceed with their task beneath the unsafe hatch cover, with knowledge of the hazard itself."

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[7] *Waterman S. S. Corp.* v. *Dugan & McNamara, Inc.*, 364 U. S. 421, 424-425 (1960); *Paliaga* v. *Luckenbach S. S. Co.*, 301 F. 2d 403, 408 (2d Cir. 1962); *DeGioia* v. *United States Lines Co.*, 304 F. 2d 421 (2d Cir. 1962).

[8] *Mancini* v. *United States*, 115 F. Supp. 605 (E. D. N. Y. 1953).

[9] For there was no demonstration of a conjoint culpability.

[10] *Piscopo* v. *United States*, 167 F. Supp. 777 (E. D. N. Y. 1958).

[11] Although not cited by the court in denying the government's claim over, the stevedore might well have argued that *volenti non fit injuria*

"In the opinion on page 331, the following occurs":

"The government in no way participated in the wrongful use of the door (hatch cover), which otherwise could have been made secure in the manner described. * * *"

"Here the government not only participated in the use of the unguarded hi-lo, provided it, having first laid out the plan which entailed its use."

Harrison,[12] the last of the three cases cited by American, parallels the others in its holding that the longshoreman libelant was free from contributory negligence. The government's agent, moreover, was found to have insisted that the unloading operations go forward despite the oily condition of the deck, stating that neither sand nor sawdust was available to remedy the slipperiness under foot. A further basis of distinction in the case cited for the exoneration of the stevedore from liability over is the rule of "*volenti non fit injuria.*"

The government in its right as indemnitee, here established, is entitled to reimbursement for attorneys' fees and expenses incurred.[13] If the government and American stipulate so that appropriate findings may be made as to such expenses and disbursements, judgment is to be settled on five days' notice; otherwise hearing is to proceed as earlier directed herein.

GEORGE ROSLING,
U. S. D. J.

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[12] *United States* v. *Harrison*, 245 F. 2d 911 (9th Cir. 1957).

[13] *Diccioia* v. *United States Lines Company* v. *American Stevedores, Inc.*, 304 F. 2d 421 (2d Cir. 1962); *A/S J. Ludwig Mowinckels Rederi* v. *Commercial Stevedoring Co.*, 256 F. 2d 227 (2d Cir. 1958), cert. dismissed 358 U. S. 801 (1958); *Paliaga* v. *Luckenbach S. S. Co.*, 301 F. 2d 403 (2d Cir. 1962); *Shannon* v. *United States*, 235 F. 2d 457 (2d Cir. 1956); *Frommeyer* v. *L. & R. Const. Co.*, 261 F. 2d 879 (3d Cir. 1958).